

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 1ST DECEMBER 2006 / 10TH AGRAHAYANA 1928

CRL.A.No. 705 of 2004(B)

SC.120/1996 of ADDL. SESSIONS COURT (FAST TRACK COURT-I),
TRIVANDRUM
.....

APPELLANTS: ACCUSED 1 TO 3:

1. JAYAN, S/O. KUNJAN NADAR, T.C.18/869,
THEKKEKARA VEEDU, KUNNAPPUZHA,
THRIKKANNAPURAM WARD, THIRUMALA VILLAGE.
2. CHANDRAN, S/O. GOVINDAN NAIR,
PANGODU EDAYANVILAKATHU VEEDU,
18/883, THRIKKANNAPURAM WARD, THIRUMALA VILLAGE.
3. JOY, S/O. RAJAPPAN NADAR, THEKKEKARA,
T.C.18/865, KUNNAPPUZHA, KONKALAM,
THRIKKANNAPURAM WARD, THIRUMALA VILLAGE.

BY ADV. SRI.M.K.DAMODARAN (SR.)
SRI.SOJAN MICHEAL

RESPONDENT: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 01/12/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J.B.KOSHY & K.PADMANABHAN NAIR, JJ.

Crl. Appeal No.705 OF 2004

Dated 1st December, 2006

JUDGMENT

Koshy, J.

Appellants were sentenced to undergo imprisonment for life each and to pay a fine of Rs.25,000/= each as they were convicted for an offence punishable under Section 302 read with section 34 of the Indian Penal Code. They were charge sheeted in connection with the murder of husband of PW2 who was working as Quality Control Inspector, Chirayinkeezh. Allegation of the prosecution was that on 20.4.1995 at 6.30 p.m. A1 uttered obscene words against PWs2 and 4 at Kunnapuzha junction and that he also shattered the spectacles worn by PW4. On coming to know about the same, on the same day at about 9.30 p.m., deceased Stanley Benzer along with CW2 came to the courtyard of his house in a motorcycle uttering obscene words against A1 who is residing near his house. Due to that enmity A1 to A3 in furtherance of their common intention of causing death of deceased Benzer trespassed into his courtyard and stabbed him with MO1 series pen knives on various parts of his body and he succumbed to injuries while undergoing treatment in the Medical College Hospital, Thiruvananthapuram on 21.04.1995 at 5.45 a.m. After the death of Benzer, PW1 went to the

police station and gave Ext.P1 First Information Statement before PW20, the then Addl. Sub Inspector of Police, Poojappura Police Station on 21.4.1995 at 8 a.m. and on the basis of Ext.P1 F.I. Statement, Crime No.41/1995 was registered for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code for which he prepared Ext.P1(a) F.I.R. PW21 was the Investigating Officer. The prosecution examined PWs 1 to 4 as occurrence witnesses. PW1 who gave the F.I. Statement was also a neighbour. PW2 is the wife of the deceased. PW3 is their son. PW4 was residing in the house of PW2 on a rental basis and she was working as a house maid in other houses. The court below mainly believed the occurrence witnesses PWs 2 to 4 and convicted the accused. Various contentions were raised by the defence and it was mainly contended that PWs 2 to 4 have not seen the incident and a fabricated story is made out.

2. We will first come to the evidence of PW1 and defects pointed out with regard to registration of the crime itself. It is not seriously disputed that PW1 was present at the time of occurrence and he gave Ext.P1 F.I. Statement. PW1 in his deposition admitted that A1 to A3 are known to him and they are also residing in the same area. However, during cross examination he deposed that he was not able to identify the accused who has done the offence even though he confirmed the other averments in Ext.P1 F.I. Statement.

According to his deposition, he was returning to his house after closing the shop at 9 p.m. Then the deceased Stanley Benzer came there in a bike and invited him to ride as a pillion rider. Since PW1 had to purchase some goods on the way, he declined the offer. The deceased went to his house along with one Solamon (CW2 not examined). He also stated that he saw PWs 2 and 4 going towards the junction and when he asked where they were going, they said that they were going to make a telephone call. After purchasing the goods, PW1 went to his house. While returning home, he saw deceased Benzer sitting on the bike in the courtyard of his house. The deceased invited PW1. At that time, the deceased was uttering obscene words and since he was repeating and continuing the abusive and obscene words, PW1 started to go back to his house. At that time, 5 to 6 persons came and inflicted injuries on the deceased and he was not able to identify the accused as there was not enough light. He also stated that when he cried aloud, the assailants ran away and at that time, the deceased was lying over his bike. When PW1 lifted him, his hands were wet and when he looked his hands in the light he found that there was blood. Immediately he along with CW2 Solamon, PWs 2, 3 and 4 took Benzer in a car brought by Solamon to the hospital. On the way, they stopped at Poojappura police station. Police asked them to take him to the Medical College Hospital immediately and when he came to know that Benzer died at 8 a.m. on the next day, he went to the Poojappura police station and gave Ext.P1 F.I.

Statement. He was declared hostile and was cross examined. During cross examination he stated that there was street light, but, he is not aware whether the street light was switched on at that time. He also stated that there was light inside the house, but, there was no light in the veranda and he was not able to see anything because of darkness. He deposed as follows:

Even though PW1 was declared hostile and cross examined by public prosecutor, no portion of Ext.P1 was put to him for contradiction. In cross examination he reiterated that PW2 went for making a telephone call and there was no telephone in the nearby houses. He deposed as follows:

In cross examination by defence, he deposed that even though he gave the F.I. Statement and signed the same, statements were not read over to him and he was asked to sign Ext.P1.

3. PWs 2 and 4 deposed in terms of the prosecution story. PWs 2 and 4 deposed that in the evening when they went out, they saw A1 at the junction and they were insulted by A1. The spectacles of PW4 was also broken and after they came back the deceased also came in a bike with CW2 abusing A1. Since he was abusing A1, they felt that something is going to happen and they went to a nearby house (house of Simon) for making a telephone call. When they returned after telephoning the police, they saw A1, A2 and A3 stabbing the deceased with MO1 series pen knives and according to them "

According to PW2, they returned after five minutes. In cross examination she also stated that when she returned, all neighbours gathered there were seeing the incident. She deposed as follows:

She also stated that she saw the stabbing even before she reached in front of the courtyard of the house. She further stated that when injured was taken to the hospital, she did not talk to the doctor as she was unconscious. She accompanied the deceased to the hospital. Evidence of defence was that PWs 2 and 4 came to the place

of incident only after the incident. Evidence of PW2 was fully corroborated by PW4. They deposed in terms of the prosecution story. PW3 has not spoken about the earlier incident between PWs 2,4 and A1, but, has spoken with regard to the incident that took place in the courtyard of the house. He identified A2 as A3. Presence of PW3 in the house was stated by PW1 hostile witness also.

4. Ext.P1 F.I. Statement was admittedly given by PW1. Even though F.I. Statement is not a substantive piece of evidence, it is the most important document as it was the first version given to the police regarding the incident. It can be used for contradicting or corroborating a witness. Even though PW1 was declared hostile, he admitted that Ext.P1 F.I. Statement was given by him and also all particulars of the prosecution case except regarding identification of the accused. According to the public prosecutor, PW1 was only trying to help the accused as they were neighbours. Accused were identified by PW2, PW3 and PW4. It is true that on the way to Medical College Hospital, they stopped at the Poojappura Police Station and the police directed them to go immediately to Medical College Hospital. At that time, no F.I. Statement was taken. PW1, CW2 as well as PWs 2 to 4 were very eager for getting urgent treatment to the injured. So, they immediately rushed to the Medical College Hospital. The deceased was declared dead at 5.15 a.m. on the next day.

Death intimation was given to the Medical College Police Station. Later it was also transmitted to the Poojappura Police station. At about 8 a.m. in the morning itself PW1 gave Ext.P1 F.I. Statement in the police station. We are of the opinion that there is no unexplained delay in giving the F.I. Statement or recording of F.I.R. as within three hours of the death the F.I. Statement was given at the police station at Poojappura. The fact that when the deceased with several bleeding injuries was taken to the Medical College Hospital, they were much concerned about the life of the injured and the fact that no F.I.Statement was given by PW1 on their way to the hospital via police station are not grounds to discard the F.I. Statement on the ground of delay. Now, it is submitted that the F.I. Statement reached the Magistrate's Court on the next day and the time of receipt was not entered by the Magistrate or court staff. It is true that the Magistrate ought to have recorded the time of receipt of the F.I. Statement. Apex Court in **State of U.P. v. Anil Singh** (AIR 1988 SC 1998) held that non-mentioning of time of despatch of F.I.R. is of no consequence. In this case, there was no cross examination also on this count. Section 157 of the Code of Criminal Procedure obligates police to send the report forthwith. However, it cannot be stated that merely because F.I.R. reached the Magistrate's Court late by a day, the entire prosecution case has to be thrown out. Inquest was prepared at 11.45a.m. on 21st and in the inquest report itself crime

number was mentioned. The postmortem was conducted at 1.50 p.m. That also mentions the crime number. It shows that crime was registered at the time mentioned in Ext.P1(a) itself and investigation was started immediately. Merely because the police sent the F.I.R little late to the court cannot go to the root of the case on the facts of this case. Object of the F.I.R is to set law in motion as held by the Supreme Court in Balram Mahto v. State of Jharkhand (2006 AIR SCW 298). Since the crime was registered immediately and investigation started, delay in despatch of F.I.R cannot be taken on the facts of this case as fatal. A three member bench of the Apex Court in Pala Singh v. State of Punjab (AIR 1972 SC 2679) held as follows:

".....Cr.P.C. requires such report to be sent forthwith by the police officer concerned to a magistrate empowered to take cognizance of such offence. This is really designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under S.159. But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable."

Since the inquest as well as postmortem were conducted in

this case immediately after registering the crime, without any delay, we are of the view that there is no infirmity in the prosecution case because the F.I.R. registered in the court only on the next day.

5. The learned counsel for the appellants very seriously argued that in Ext.P6 inquest report in column No.XII name of the accused and nature of the weapons ought to have been mentioned. But, at column XII it is noted that accused were already identified and weapons have to be recovered. In col.No.X names of three accused were mentioned by a person called Simon and even though he was not an eye witness. It is true that at the time of inquest the weapons were not recovered. We are of the opinion that since names of the accused were mentioned in column No.X and merely because in column No.XII their names were not mentioned, it cannot be presumed that F.I. Statement was given after the inquest was conducted. A three member bench of the Supreme Court in **Radha Mohan Singh v. State of U.P.** (2006 AIR SCW 421) recently considered the question of non-mentioning of names of accused in inquest report. After considering in detail the purpose of Section 174 of Cr.P.C., it was held by the Apex Court that purpose of inquest report was only limited to ascertainment of cause of death and it is not necessary to mention names of the accused or eye witnesses or weapons in the inquest report. The Apex Court held that there is absolutely no requirement in law

of mentioning the details of the FIR, names of the accused or the names of the eye-witnesses or the gist of their statement nor it is required to be signed by any eye-witness. (See also Babu Singh v. State of Punjab (AIR 1996 SC 3250), Khujji v. State of M.P. (AIR 1991 SC 1853)). Statement recorded in inquest report is not a basic or substantive evidence as held by the Apex Court in Munshi Prasad v. State of Bihar (AIR 2001 SC 3031).

6. Another major contention put forward by the learned counsel for the accused is that when Ext.P5 wound certificate was prepared PW2 stated before the doctor as follows:

It was specifically stated that the above statement was given by the wife of the deceased. The doctor also deposed that the above statement was given by PW2. It is the case that the nature of weapons or names of accused were not mentioned. It is also stated that the incident occurred in the darkness and near the house and, therefore, PW2 might not have seen the incident. It is not disputed that immediately after the incident PW1, CW2 and PWs 2 to 4 etc. together took the deceased to the hospital and PW2 gave the statement. PW2 as well as PW4 stated that PW2 was fully upset. It is also not necessary that names of the accused should be mentioned in the wound certificate by the doctor.

If names of the accused were stated immediately, that would have added strength to the prosecution case. But, merely because names of the accused were not mentioned or if stated but not recorded by the doctor, it cannot be stated that PW2 has not seen the incident. Nature of the weapons used were not mentioned. That is also not necessary to be mentioned in the wound certificate. Apex Court also held that non-disclosure of names of assailants to the doctor who treated the deceased by the related eye witness is of no consequence - Pattipati Venkaiah v. State of Andhra Pradesh (AIR 1985 SC 1715) and Bhargavan and others v. State of Kerala (AIR 2004 SC 1058). In the wound certificate, the alleged cause was written as stated by PW2. The incident occurred near the house. PWs 1 to 4 stated that the incident occurred in the courtyard of the house and the courtyard itself is in two different levels (two different terrace). PW2 deposed that when the deceased abused A1 with obscene words, she apprehended danger and she went to the neighbour's house to inform the police over telephone. That fact is deposed by PW1 also though a hostile witness. He also stated that when he came, he saw PWs 2 and 4 going to a neighbouring house for telephoning and deceased was sitting on a motor bike and uttering obscene words. The version of PWs 2 and 4 was that immediately after making telephone they came back and saw the incident. While they were coming, they saw accused stabbing the deceased. Therefore, it cannot be stated that PWs 2, 3 and 4 cannot be believed or they have not seen the

incident. PW2 being the wife and PW3, being the son of the deceased would not have stated the names of the accused falsely to mislead the prosecution so that real assailants of their dear one would escape. Their evidence cannot be discarded merely because they are related to the deceased. In Dali P Singh v. State of Punjab (AIR 1953 SC 364) it was held as follows:

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person."

After scrutiny of evidence we are of the opinion that the evidence cannot be discarded. Apex Court in Anil Sharma v. State of Jharkhand ((2004) 5 SCC 679) held that evidence of eye witnesses cannot be rejected merely because they are relatives. Here, since offence was committed near the house in the night, they are natural witnesses. Even though PW1 stated in the court that he did not identify the accused immediately after the incident, when F.I. Statement was given by him, he had mentioned the names of these three accused. A reading of the evidence of PWs 1 to 4 would show that the incident occurred and the deceased died at the hands of A1 to A3. The Executive Engineer of the Electricity Board was also examined in this case to prove that there was

street light near the house and it was switched on at that time. The incident took place only at 9.30 p.m. All the witnesses as well as accused were staying in the same colony and very close neighbours and there cannot be any difficulty for an identification.

7. It was argued very vehemently that all the material witnesses were not examined and hence prosecution failed to prove the charges beyond reasonable doubt. CW2 though cited as a witness was not examined. But, here, PW1 to PW4 were already examined. As held by the Apex Court in **Rameshwar Dayal v. State of U.P.** (AIR 1978 SC 1558), non-examination of a witness who has been mentioned in the FIR and having accompanied the deceased by itself cannot be a fatal defect, when eye witnesses already examined are believable. The prosecution is not bound to produce all the witnesses who have seen the occurrence. Here, CW2 was summoned, but, he was not examined as public prosecutor is at liberty to choose the witnesses to be examined. (See **Hukam Singh v. State of Rajasthan** ((2000) 7 SCC 490). In any event, there is no infirmity in the evidence of PWs 2 to 4. In view of their clear and cogent evidence adduced in this case, we are of the opinion that conviction based on their evidence cannot be set aside merely because neighbours like CW2 Solamon were not examined.

8. The prosecution also relied on the recovery of weapons used in the crime and dress worn by the accused at the time of occurrence at disclosure of the accused. It was argued that recovery was based on the joint confession as joint mahazar would appear that they gave joint confession and on that basis recovery was made. But, in the mahazar it was stated that A1 recovered the pen knife used by him, A2 recovered the pen knife used by him and A3 recovered the pen knife used by him from the places where those weapons were hidden. The Investigating Officer deposed that A1 had stated that he concealed the knife in the property of A2. A2 and A3 also made similar confession. That part of the Investigating Officer's evidence remain unchallenged. Therefore, it is not a common confession, but, there are separate confessions and on the basis of those confessions accused led the police to the places where weapons were hidden and they individually took out the weapons used by each of them. While preparing the mahazar, for convenience, it was stated that on the basis of confession of accused weapons were recovered. Here, there are separate recoveries based on separate confessions as can be seen from Investigating Officer's evidence. Dress worn by the accused were also similarly recovered. It is pertinent to note that postmortem report clearly shows the blood group of the deceased as O⁺ve and the recovered knives as well as the dress worn by the accused contained the same group of blood as can be seen from chemical examination report. Therefore, the

evidence of PWs 2 to 4 are corroborated by the recovery of dresses worn by the accused as well as the weapons used by them. A reading of the entire evidence, both oral and documentary, would show that fatal injury was inflicted on the deceased by A1 to A3. When three persons jointly inflict several injuries on the body of a person, that too, in the dim light, it cannot be stated with precision that which injury was caused by which accused. They jointly inflicted injuries. In this connection, we refer to the decision of the Hon'ble Apex Court in Harshadsingh Pahelvansingh Thakore v. State of Gujarat ((1976) 4 SCC 640) wherein it was held as follows:

"..... When a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people place with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their fixing constructive liability conclusively silences such a refined plea of extrication. (See: Amir Hussain v. State of UP ((1975) 4 SCC 247) and Maina Singh v. State of Rajasthan ((1976) 2 SCC 827)."

9. Next is the question regarding the nature of offence committed by them. It is the prosecution case itself that the provocation started by the deceased himself.

He was abusing A1 with very obscene words. Residence of A1 was only 50 metres away from the house of the deceased. The deceased was abusing with obscene words sitting on the motor bike. Even according to PW2, she was afraid that something will happen because of these obscene words. Therefore she went to call police. PW1 and PW4 also gave statement to the same effect. So, when obscene words started, A1 along with A2 and A3 came to stop him following which a sudden fight might have occurred. When accused arrived, PW2 and PW4 were not present. PW3 who was inside the house when quarrel started saw the incident after quarrel started. But, there is positive and conclusive evidence about participation of all the three accused in causing death. So, the fact that the incident was provoked by the deceased himself is very clear and it cannot be stated that the accused came in a pre-planned manner with an intention to cause his death. It is true that as per the wound certificate there were six injuries. Three injuries were grievous and three other injuries were simple. At the same time, those three injuries were serious enough to cause death. In these circumstances, we are of the opinion that accused can be punished for an offence punishable under section 304 Part I of the Indian Penal Code and considering the nature of offence, we are of the view that they can be sentenced to undergo Rigorous Imprisonment for seven years each with a fine of Rs.10,000/= each. On realization of the fine amount, Rs.20,000/= shall be given to PW2, wife of the

deceased. In default of payment of fine, they should also suffer Rigorous Imprisonment for another six months. They are also entitled to right of set off.

The appeal is allowed in part.

J.B.KOSHY
JUDGE

K.PADMANABHAN NAIR
JUDGE

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